IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1037 OF 2005

IN

NOTICE OF MOTION NO.4065 OF 2005

IN

B.C.C.S.C.SUIT NO.4655 OF 2005

Mr.Rafiq Hameed Sayyed .. Appellant
Versus
The Municipal Corporation of
Greater Mumbai .. Respondent

Mr.Vijay Hegde for appellant
Mr.Bhor for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 10th November 2005.

(Vacation Judge)

P.C.

. The notice of motion was taken out by the

appellant original plaintiff in the suit filed by him to challenge the notice issued under section 351 of the Mumbai Municipal Corporation Act, 1888. Pursuant to the said notice a reply was filed by the appellant and it is his case that he pointed out to the authorities that the structure which is put to composite use as P.C.O. cum Pan-bidi shop is authorised and existing for a considerable period of time. Further, on an earlier occasion the appellant was directed to remove the structure because it was creating obstruction to the smooth flow of traffic. The appellant has complied with this requirement. The grievance is that despite furnishing proof of the existence of the structure as well as its authorisation and due compliance with the requisition of Municipal Corporation, the authorities ignoring entire material have directed demolition of the structure because it is not in existence prior to the datum line i.e. 17th April 1962.

2. Mr.Hegde, learned Counsel appearing for appellant submits that the authority as well as learned Judge have proceeded on the basis that the existence of the structure prior to the datum line was an issue. Mr.Hegde invites my attention to the fact that the structure falls within M.I.D.C. Permission to put up the stall/ P.C.O. was granted by M.I.D.C. Mr.Hegde submits that N.A. assessment is being paid for non agricultural user. The notice purports to invoke section 351 but does not set out that the existence of the structure itself along with its dimension is the subject matter of the action proposed by the Corporation. Mr.Bhor learned Counsel appearing for Corporation states that the material which was placed by the appellant has been duly considered and the Assistant Commissioner was right in his conclusion.

3. In my view, at an ad-interim stage in the

absence of the affidavit on behalf of respondent as well as production of necessary documents on record, the learned Judge ought not to have concluded that there is no material on record to show that the structure existed prior to the datum line. In my view, aforesaid aspect of the matter ought to have been considered in greater details after the records are produced and affidavit filed. The structure ought to have been protected till hearing and final disposal of the notice of motion. In the light of the aforesaid, granting one opportunity to the appellant, it is directed that the suit structure shall not be demolished till the hearing and final disposal of the aforesaid notice of motion. Mr.Bhor states that the reply affidavit would be filed within two weeks. Rejoinder, if any, would be filed within a period of one week thereafter. Notice of motion to be disposed of within six weeks from the date of receipt of copy of this order.

4. It is clarified that the direction not to demolish the structure would operate only if the structure is not already demolished. Appeal stands disposed of. In view of the disposal of the appeal the civil application does not survive and the same is dismissed as such.

(S.C.DHARMADHIKARI, J)